IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 9, 2007 Session

ANDREW H. BLACKBURN v. CSX TRANSPORTATION, INC.

Appeal from the Circuit Court for Davidson County
No. 03C1016 Barbara Haynes, Judge

No. M2006-01352-COA-R10-CV - Filed: May 30, 2008

We granted an application for extraordinary appeal to determine whether the trial court erred when it granted a new trial in this case. The trial court granted the railroad a new trial based on insufficiency of the evidence, thereby setting aside an almost three million dollar verdict for plaintiff in this case under the Federal Employers' Liability Act ("FELA"). Since we find that the federal standard requiring the verdict to be against the "clear weight" of the evidence governs and that the trial court erroneously applied the Tennessee standard, we vacate the judgment granting a new trial and remand the case for consideration of the motion for new trial in accordance with this opinion.

Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Circuit Court Vacated; Case Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

James G. Thomas, William T. Ramsey, Nashville, Tennessee; Andrew Lampros, Atlanta, Georgia, for the appellant, Andrew H. Blackburn.

Christopher W. Cardwell, Mary Taylor Gallagher, Nashville, Tennessee, for the appellee, CSX Transportation, Inc.

OPINION

This court granted the application for an extraordinary appeal under Tenn. R. App. P. 10 filed by Andrew Blackburn to review the trial court's decision to grant the motion for a new trial filed by CSX Transportation, Inc. ("CSX"). Mr. Blackburn had sued his employer, CSX, under the Federal Employers' Liability Act, 45 USC ¶ 51 *et seq*. ("FELA"), seeking to recover for personal injuries he sustained when he was thrown from a rail car. The jury had awarded Mr. Blackburn $2,905,000. The trial court granted CSX's request for a new trial since it found that the verdict was not supported by the evidence. Mr. Blackburn appealed.

I. INTRODUCTION

A. Procedural Background

In its motion for a new trial, CSX relied on several alternative grounds. First, CSX argued that the verdict is against the weight of the evidence since Mr. Blackburn failed to prove that the train was handled negligently or that the handling of the train would cause Mr. Blackburn to be thrown from it. Second, CSX argued the trial court made two errors regarding jury instruction and admission of expert proof that necessitated a new trial. Third, CSX argued that on four occasions the trial court erred when it failed to grant a mistrial. Three of these occasions arose when Mr. Blackburn's counsel accused CSX of destroying event recorder data and the final occasion was in closing argument when Mr. Blackburn's counsel addressed pain and suffering for the first time.

The written order granting the new trial was entered on May 24, 2006. While the trial court's written order did not specify the grounds it relied upon, the record makes clear that the trial court granted a new trial based on the sufficiency of the evidence and not the alleged errors made by the trial court.[1] At a hearing on this motion, the trial court made the following ruling from the bench:

> I want you to know that I take my role as a 13th juror seriously. I have rarely used it. I have reviewed all the cases on the 13th juror and also any railroad cases. In addition, I have four legal pads of notes.
>
> Based on everything that the Court has done, at this time the Court is going to grant a new trial.

It should also be noted that the trial court did not specify whether it relied upon state or federal law governing new trials in its order or in its comments in the record. In addition to the dispute between the parties whether state or federal law applies, the parties also disagree as to whether the trial court applied Tennessee or federal law when it granted the new trial.

On June 28, 2006, Mr. Blackburn filed for an Extraordinary Appeal under Tenn. R. App. P. 10. It is clear that the issue presented to this court was whether the trial court erred when it decided the verdict was against the weight of the evidence. In his request for an extraordinary appeal, Mr. Blackburn presented two issues for review; (1) whether the trial court erred when it applied Tennessee law to its consideration of sufficiency of the evidence and (2) whether a new trial was appropriate under "any conceivable standard" for evaluating the sufficiency of the evidence.

It is clear that when this court granted the application of CSX for a new trial, the issue was whether the trial court erred when it granted a new trial based on sufficiency of the evidence.

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[1] On appeal, both parties address their arguments to whether a new trial was warranted based upon sufficiency of the evidence.

Consequently, the only issue before us is whether the trial court improvidently granted the new trial based on sufficiency of the evidence.

B. Position of the Parties

In his brief submitted after this court granted his request for an extraordinary appeal, Mr. Blackburn argues that the trial court erred when it granted a new trial based on sufficiency of the evidence. Mr. Blackburn argues that the trial court erroneously applied the more relaxed Tennessee standard, *i.e.*, whether the evidence preponderates for or against the verdict, but should have applied the more stringent federal standard applicable to new trial applications in FELA cases. Mr. Blackburn then makes alternate arguments on the applicability of two distinct federal standards. First, Mr. Blackburn argues that the trial court was required to apply the standards applicable to new trials under Rule 59 of the Federal Rules of Civil Procedure, *i.e.* that the verdict is against the "clear weight" of the evidence. Second, Mr. Blackburn also appears to argue that the trial court was required to apply the standard required by federal courts when the issue involved directed verdicts in FELA cases. His argument appears to be that this FELA standard requiring "complete absence of probative fact" applies to any determination of evidence sufficiency in a FELA case, whether it be for a directed verdict or new trial.

On the other hand, CSX primarily argues that the Tennessee standard for the grant of a new trial was applicable in this FELA case tried in state court. Alternatively, CSX argues that if the court finds the federal standard to be applicable, the grant of a new trial herein should be affirmed on several grounds. First, CSX argues that there was no error as alleged by Mr. Blackburn since the trial court applied the more stringent federal standard. Second, CSX argues that even if the trial court erroneously applied Tennessee law, there is no reversible error since there is little substantive difference between the two standards. Third, even if the trial court erroneously applied the state standard and there is substantive difference between the two standards, the insufficiency of the evidence required a new trial under either standard.

C. Framework for Analysis

Given the complicated nature of the issue before us, it is helpful to explain at the outset the framework of our analysis. First, we will determine whether state or federal law governs a request for a new trial in a FELA case tried in state court. In order to determine the appropriate new trial standard, it is crucial to first understand the nature of a motion for a new trial and in what respects it differs from a judgment notwithstanding the verdict, *i.e.* judgment as a matter of law. This is so because much of the United States Supreme Court precedent cited by the parties herein involves motions for directed verdict. Without an appropriate analytical framework, failure to appreciate the difference between standards relevant to each type of motion can cause needless confusion.

Clearly, the parties draw distinctions between the standards that govern new trials in state and federal court. In addition to discussing the distinctions between new trials and directed verdicts, as a preliminary matter we will also address the differences between consideration of a new trial under

Tennessee and federal law. As will be discussed, it is clear that a new trial is available under both the federal and Tennessee rules if the verdict is against the weight of the evidence. The difference in federal and state law is the weight of the evidence required before a new trial is appropriate.

Once we have decided whether state or federal law is applicable to the issue, we will then examine the standard of review we are obliged to apply in reviewing an order granting a new trial in a FELA case. We will then finally turn our attention to the trial court's decision in this case in light of the standard of review we are obliged to apply on appeal.

II. General Discussion of Law Governing New Trial

A. Confusion Between Motion for a New Trial and Motion For Judgment As a Matter of Law

It is easy to fail to distinguish the unique aspects of a motion for a new trial with a motion for judgment as a matter of law. While both may be made after a jury has rendered a verdict, their consequences are quite different. Due to the difference in consequences, trial courts generally apply different standards to their consideration and different standards of review are applicable on appeal.

> A renewed motion for judgment as a matter of law may be joined, in the alternative, with a motion for a new trial under Rule 59. These motions have wholly distinct functions and entirely different standards govern their allowance. Nevertheless there has been confusion and some courts persist in stating, as the standard for judgment as a matter of law, the much more lenient test that is applicable to a motion for a new trial when it is based on the ground that the verdict is against the weight of the evidence.
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> The contrasts between the two motions are dramatic. If a motion for a new trial is granted, the case is tried again. If the motion for judgment as a matter of law is granted, the case is at an end. Because of the finality that the latter motion has, it is natural that it should be measured by a far more rigorous standard. On a motion for new trial, the court has a wide discretion to order a new trial whenever prejudicial error has occurred. On a motion for judgment as a matter of law, it has no discretion whatsoever and considers only the question of law whether there is sufficient evidence to raise a jury issue. On a motion for new trial the court may consider the credibility of witnesses and the weight of the evidence. On a motion for judgment as a matter of law, it may not.
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> All of this has been understood for some time and is thoroughly settled in the cases.

9AWright, Miller & Kane, Federal Practice and Procedure: Civil 2d§ 2531 (1995).

"Judgment as a matter of law" is also described as "judgment notwithstanding the verdict," "JNOV," or "directed verdict," depending upon when it is considered during the proceedings. Although the procedural context may be either judgment as a matter of law before the case is submitted to the jury or after submission to a jury, the standard is the same. 9A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2524 (1995). This same standard applies to the trial court and on appeal. *Id*. The standard is "whether there is evidence upon which the jury properly could find a verdict for that party." *Id*. The standard is set high and is "cautiously and sparingly" used since the consequence is extreme: one party is deprived of a jury determination of the facts. *Id*. With a directed verdict, the trial court may not weigh the evidence, pass on witness credibility, or substitute its judgment for that of the jury. *Id.*

B. Motion For a New Trial

It is important to note at the outset that appellate decisions on the granting of new trials are not as common as directed verdicts since an order granting a new trial is not a final order. As a general rule, granting a new trial is not "appealable," since it is not a final judgment and is interlocutory. 11 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2818. A distinction has been made, however, between "appealability" and "reviewability." *Id*. While an order granting a new trial is not ordinarily "appealable," it is reviewable. *Id*. The decision to *grant* a new trial may be appealed in at least two ways. First, as in this case, by interlocutory appeal. Second, on appeal from a judgment in the second trial, the appellant may claim error in the grant of the new trial. *Id*.

The procedure for motions for a new trial are set out in Rule 59 of the Tennessee Rules of Civil Procedure and Rule 59 of the Federal Rules of Civil Procedure. Neither rule sets out standards that are to apply when considering a motion or the consequences of granting the motion.

Rule 59 of the Federal Rules of Civil Procedure provided as follows when this matter was tried:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

The Tennessee Rule of Civil Procedure likewise does not recite the grounds available for a new trial but recognizes that a new trial may be granted because the verdict is against the weight of the evidence.[2]

There is no question that under both state and federal law a trial court may grant a new trial when the verdict is against the weight of the evidence. The preliminary issue in this case is whether and to what extent the standard to grant a new trial may differ under state and federal law.

1. Federal Standard

With regard to the standard a trial court is to use when considering whether to grant a new trial, the "governing principle" is that the trial court "has the power and duty to order a new trial whenever, in its judgment, this action is required to prevent injustice." 11 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d§ 2805(1995). As referenced above, Rule 59 of the Federal Rules of Civil Procedure recognizes the motion for a new trial but does not list the grounds or standard for a new trial. Common grounds for granting a new trial include the verdict is against the weight of the evidence, a prejudicial error of law, or misconduct affecting the jury. *Id.*

The power of a trial court to grant a new trial because the verdict is against the weight of the evidence is clear. 11 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d§ 2806(1995). Unlike a motion for judgment, as a matter of law, the judge may order a new trial even though there is substantial evidence to support the verdict. *Id*. Also, in sharp contrast to a motion for judgment as a matter of law, on a motion for a new trial the judge is free to weigh the evidence and consider the credibility of witnesses. *Id*. For this reason a trial judge is often described as a "13th" juror "when considering a motion for a new trial." MOORE'S FEDERAL PRACTICE Vol. 6A § 59.08[5] states:

> Some courts have stated that, in ruling on the [new trial] motion, the trial judge acts as a thirteenth juror. Properly understood and applied, no fault can be found with them for the judge does act to evaluate and weigh the evidence. But while he has the responsibility for the result no less than the jury, he should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of fact, he would have reached a different result; and in that sense he does not act as a thirteenth juror in approving or disapproving the verdict.

The standard federal courts employ in deciding whether to grant a new trial is whether the verdict is against the "clear weight" of the evidence. When ruling on motions for new trials based upon sufficiency of the evidence, the Sixth Circuit Court of Appeals has stated the standard thusly:

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[2]Tennessee Rules of Civil Procedure provides that Rule 59 is applicable to motions for a new trial and the time for the motion. Tenn. R. Civ. P. 59.01 and 59.02. If the new trial is granted because the verdict is against the weight of the evidence, then Tenn. R. Civ. P. 59.06 allows either party to request a different judge for the retrial.

> A court may set aside a verdict and grant a new trial when it is of the opinion that the verdict is against the clear weight of the evidence; however, new trials are not to be granted on the grounds that the verdict was against the weight of the evidence unless that verdict was unreasonable. Thus, if a reasonable juror could reach the challenged verdict, a new trial is improper.

Tisdale v. Federal Exp. Corp., 415 F.3d 516, 528-29 (6th Cir. 2005) (quoting *Barnes v. Owens-Corning Fiberglass Corp.*, 201 F.3d 815, 820-21 (6th Cir. 2000)).

The trial court may not set aside the verdict to grant a new trial if the judge would have reached a different verdict. 6A MOORE'S FEDERAL PRACTICE § 59.08[5] (1996).

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is **quite clear** that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. (emphasis added)

Id.

2. State Standard

In Tennessee, the law is clear that if a motion for a new trial is filed, then the trial court is under a duty to independently weigh the evidence and determine whether the evidence "preponderates" in favor of or against the verdict.[3] *Woods v. Walldorf & Co., Inc.*, 26 S.W.3d 868, 873 (Tenn. Ct. App. 1999); *Shivers v. Ramsey*, 937 S.W.2d 945, 947 (Tenn. Ct. App. 1996); *Witter Nesbit*, 878 S.W.2d 116, 121 (Tenn. Ct. App. 1993). This role is referred to in Tennessee as that of a "thirteenth juror." *Holden v. Rannick*, 682 S.W.2d 903, 904-05 (Tenn. 1984).

In reviewing the evidence to determine whether a new trial should be granted, the trial court is to make "an independent decision on the issues" and not defer to the judgment of the jury. *Id*. at 906. If the trial court fails to make such an independent decision and defers to the jury, then the trial court fails to perform his duty as a thirteenth juror. *Id*.

The trial court, in effect, sits as a juror and, if employing its independent judgment the trial court is dissatisfied with the verdict, then the trial court is required to order a new trial. In 2003, the Tennessee Supreme Court reaffirmed the trial court's role in considering a motion for a new trial that had been the law in Tennessee almost 100 years.

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[3] This standard should not be confused with our standard of review on appeal if the trial court has approved the verdict. In such a case, on appeal we are to affirm the verdict if the record contains "any material evidence to support the jury's verdict." Tenn. R. App. 13(d); *Washington v. 822 Corp.*, 43 S.W.3d 491, 494 (Tenn. Ct. App. 2000).

This duty of a trial judge to act as "thirteenth juror" is well established:

> The reasons given for the rule are, in substance, that the circuit judge hears the testimony, just as the jury does, sees the witnesses, and observes their demeanor upon the witness stand; that, by his training and experience in the weighing of testimony, and the application of legal rules thereto, he is especially qualified for the correction of any errors into which the jury by inexperience may have fallen, whereby they have failed, in their verdict, to reach the justice and right of the case, under the testimony and the charge of the court; that, in our system, this is one of the functions the circuit judge possesses and should exercise -- as it were, that of a thirteenth juror. So it is said that he must be satisfied, as well as the jury; that it is his duty to weigh the evidence; and, if he is dissatisfied with the verdict of the jury, he should set it aside.

Davidson v. Lindsey, 104 S.W.3d 483, 488 (Tenn. 2003) (quoting *Cumberland Tel. & Tel. Co. v. Smithwick*, 79 S.W. 803, 804 (Tenn. 1904)).

The discretion permitted a trial judge in granting or denying a new trial is so wide that our courts have held that he or she does not have to give a reason for his ruling. If the trial judge does give reasons, the appellate court will only look to them for the purpose of determining whether the trial court passed upon the issue and was satisfied or dissatisfied with the verdict. *Wakefield v. Baxter*, 297 S.W.2d 97 (Tenn. Ct. App. 1956). If the trial judge does not give a reason for her action, the appellate courts will presume she did weigh the evidence and exercised her function as thirteenth juror. *Mize v. Skeen*, 468 S.W.2d 733, 736 (Tenn. Ct. App. 1971); *Benson v. Fowler*, 306 S.W.2d 49 (Tenn. Ct. App. 1957); *Gordon's Transports v. Bailey*, 294 S.W.2d 313 (Tenn. Ct. App. 1956).

3. Distinction Between Federal and State Standards

If the state and federal standards for a new trial were the same or even substantially similar, further analysis as to what standard the trial court in this case applied would be unnecessary. However, at a very basic level, the standards are quite different since the Tennessee standard uses "preponderance" of the evidence, while the federal standard requires that the verdict be outweighed by the "clear" weight of the evidence. Under state law if a judge is "dissatisfied" with a jury verdict then the trial court is at liberty to order a new trial. Under the federal standard, the verdict must be unreasonable. Under state law a court must make an independent decision, while under federal law if a reasonable juror could have reached the verdict, the trial court is to defer. We believe that the differences between the standards are both apparent and significant.

III. STANDARD THAT GOVERNS NEW TRIAL DETERMINATION IN FELA CASE TRIED IN STATE COURT

A) Applicability of State or Federal Law

1. Federal Standard Applicable

As a general rule, when a federal cause of action, including a FELA case, is brought in state court, federal law governs substantive issues while state law governs procedural matters. 32B American Jurisprudence, FEDERAL EMPLOYERS' LIABILITY AND COMPENSATION ACT, § 54. In addition, both motions for a new trial and directed verdict are deemed to be procedural such that when a federal cause of action is tried in state court, then, as a general rule, state law governs the motion.

Given the foregoing, it would appear to be a foregone conclusion that a motion for a new trial in a FELA case tried in state court would be governed by state law. The determinative distinction between such generalities and a FELA case, however, lies in decisions by the United States Supreme Court on the significance of jury decisions in FELA cases and the Court's holding that a procedural rule cannot be used to interfere with a substantive right.

FELA was passed to extend statutory protection to railroad workers because of the high rate of injury to workers in that industry. *Hardyman v. Norfolk & Western Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001); *Levy v. Southern Pacific Transportation Company*, 799 F.2d 1281, 1288 (9th Cir. 1986). The statute is a broad, remedial statute which is to be liberally construed in order to accomplish its purpose. *Urie v. Thompson*, 337 U.S. 163, 180, 69 S.Ct. 1018, 1030 (1949).

In *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), the United States Supreme Court was presented with the question of whether a North Carolina trial court had improperly submitted a FELA case to the jury. *Id*. at 478. Over the objections of the defendant, the state trial court submitted the personal injury case under FELA to the jury, which gave the plaintiff a $20,000 judgment. *Id*. at 479. The North Carolina Supreme Court reversed the judgment on the ground that the evidence failed to support the jury's verdict. *Id* at 479. This decision was then appealed to the United States Supreme Court which held as follows:

> There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In [FELA] cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. It is true that this Court has held that a state need not provide in [FELA] cases any trial by jury according to the requirements of the Seventh Amendment. But when a state's jury system requires the court to determine the sufficiency of the evidence to

> support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under [FELA] must be more than a scintilla before the case may be properly left to the discretion of the trier of fact-in this case, the jury. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. . . .

Id. at 479-80 (citations omitted) (emphasis added).

The *Brady* court was addressing two distinct issues in the foregoing passage. First, the Court held that whenever sufficiency of the evidence is at issue in a FELA case, in order for litigants in state and federal court to receive similar treatment, one must apply a "uniform federal rule." *Id*. Second, the Court discussed the standard to be applied in a request for directed verdict in a FELA case. It is important to note that the standard discussed in *Brady* was not for a new trial, but instead was for a directed verdict that robs a jury of any role.

In *Lavender v. Kurn*, 327 U.S. 645 (1946), the United States Supreme Court reviewed a decision by the Missouri Supreme Court which reversed a judgment entered for plaintiff in a FELA case. A Missouri jury found for plaintiff in a FELA case awarding him $30,000. The trial court entered the judgment. On appeal, however, the Missouri Supreme Court reversed, finding "that there was no substantial evidence of negligence to support the submission of the case to the jury." *Id*. at 647. In other words, the question in *Lavender* was whether the state trial court erred when it failed to enter a directed verdict.

The United States Supreme Court in *Lavender* did not expressly state that it was applying federal law to a motion for directed verdict in state court. It is nevertheless quite clear that the Court formulated and applied a federal standard to whether a directed verdict in a FELA case in state court should be granted. The United States Supreme Court in *Lavender* reversed the state appellate court and found that the evidence was sufficient to submit the case to the jury.

> It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. **Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.** But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Id. at 652-53 (emphasis added) (citations omitted).[4]

In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), the United States Supreme Court considered a holding in a state FELA case wherein the Missouri Supreme Court reversed a jury finding on the ground that the evidence did not support a finding of liability. The Supreme Court interpreted the Missouri court opinion as finding that "as a matter of law" the plaintiff's conduct was the sole cause of his injuries. *Id*. at 504. The Court explained in detail how FELA differed from traditional negligence cases since the plaintiff can recover under FELA if the employer "played any part, even the slightest, in producing the injury." *Id*. at 506. Consequently, the "primary question" in a FELA case is whether employer fault played "any part" in the employee's injury. *Id*. at 509. The Court concluded that the Missouri Supreme Court erred and that the evidence was sufficient to support the jury award to plaintiff. *Id*. at 503.

The court in *Rogers* discussed at length the emphasis Congress placed on the jury's role in making the decision on the "primary question." *Id*. at 509.

> Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination.

Id. at 509. Again, the issue in *Rogers* was whether a jury should have the opportunity to decide the question.

In each of the foregoing decisions, the Supreme Court discusses the crucial role of the jury in FELA cases. Furthermore, although all of the foregoing FELA cases were tried in state court, the Supreme Court applied federal and not state standards to whether a directed verdict could be granted.

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[4] Thus, the standard in a FELA case requiring "a complete absence of probative fact" was born as it applies to whether a case should be given to a jury or whether judgment notwithstanding a jury verdict should be entered. The relevance of this standard is discussed later herein.

While the issue was not whether state or federal law governed the standard to be applied to a directed verdict or a new trial, the United States Supreme Court in *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949), held that procedural/substantive distinctions did not govern in FELA cases where sufficiency of the pleadings to present a question for a jury were at issue. In *Brown*, plaintiff brought a FELA action in Georgia state court. *Id*. at 294. The trial court granted the railroad's motion to dismiss, and that dismissal was affirmed on appeal in the Georgia courts. *Id*. at 295. The United States Supreme Court granted certiorari to determine whether the complaint set forth a cause of action "sufficient to survive a general demurrer resulting in final dismissal." *Id*. The Supreme Court granted certiorari "because the implications of the dismissal were considered important to a correct and uniform application of [FELA] in the state and federal courts." *Id*. On appeal, the railroad argued that whether to grant a dismissal by demurrer was procedural and consequently governed by Georgia law. The Court held, however:

> It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from 'substantive rights' granted by Congress in FELA cases, they are free to follow their own rules of 'practice' and 'procedure.' To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best. . . . Other cases in this Court point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure.' Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice. And we cannot accept as final a state court's interpretation of allegations in a complaint asserting it.

Id. at 296 (citations omitted).[5]

Given the foregoing Supreme Court decisions, we conclude that federal law provides the standard to determine whether to grant a new trial in a FELA case tried in state court. In *Brady*, the Supreme Court expressly held that "to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question." 320 U.S. at 479-80. The Court then applied a federal standard in *Brady*, *Lavender* and *Rogers* to determine sufficiency of the evidence for directed verdict purposes. In each case, the Supreme Court reiterated the

[5]Mr. Blackburn cites other decisions wherein the United States Supreme Court found the distinction between procedural and substantive rights to be irrelevant when the issue arose under FELA. *Monessen v. Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 336 (1988) (court rejected procedural substantive distinction in determining whether to award prejudgment interest in FELA case); *Dice v. Akron, C. & Y. Ry. Co.*, 342 U.S. 359, 363 (1952) (right of jury trial under FELA "too substantial a part of the rights accorded" by FELA to be classified as procedural).

preeminence of jury decisions in FELA matters and that any interference with a jury determination must be made pursuant to uniform federal laws.[6]

While we are concerned with the rather narrow issue of sufficiency of the evidence in the context of a new trial, these cases also stand for a more expansive holding that goes well beyond our narrow issue:

> [i]t is clear that the best broad rule, and one which has the advantage of being completely authoritative while avoiding the necessity of any direct concern with the procedure - substance distinction, is that a federal right may not be interfered with, lessened, or destroyed by a local rule of practice or procedure.

C.C. Marvel, Comment Note *Applicability of State Practice and Procedure in Federal Employees' Liability Act Actions Brought In State Courts*, 79 A.L.R.2d 553 (1961).

While there is a difference of opinion on this issue among the various state courts that have decided the new trial issue, at least two state supreme courts that have examined the issue in depth have likewise concluded that federal standards govern new trial determinations in state court proceedings entertaining a FELA claim.

We believe the South Carolina Supreme Court in *Norton v. Norfolk Southern Railway Company*, 567 S.E.2d 851 (S. C. 2002), correctly articulated the applicable standard. Applying state law, the trial court granted plaintiff's request for a new trial after the jury found for the railroad in a FELA case. *Id*. at 853. The South Carolina Supreme Court reversed, finding that the trial court erred when it used the state law standard to determine whether to grant a new trial in a FELA case. *Id*. at 854. The Court in *Norton* succinctly found as follows:

> FELA is a federal statue which provides the framework for handling the injury claims of federal railroad workers. State courts have concurrent jurisdiction to hear FELA claims. 45 U.S.C. § 56. A FELA action brought in state court is controlled by federal substantive law and state procedural law. However, a form of practice may not defeat a federal right. *Brown v. Western Ry. of Ala*., 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949). It is firmly established that questions of sufficiency of evidence for the jury in cases arising under FELA in state courts are to be determined by federal rules. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943).

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[6]While an argument can be made that since the differences between a new trial and a directed verdict are so great, that federal law need not apply to new trial determinations since the role of a jury remains. While a directed verdict has far more dire consequence than a new trial, *i.e*., elimination of a jury determination, we do not believe this carries a distinction that affects our conclusion. The Supreme Court in *Brady* also stated that in FELA cases "only by a **uniform** federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." 320 U.S. at 479-80. Uniformity was likewise the reason why the Supreme Court applied federal law to determine whether a complaint alleged sufficient grounds to proceed in a FELA case. *Brown*, 338 U.S. at 294.

Id. at 853.

In *Head v. CSX Transportation, Inc.*, 524 S.E.2d 215 (Ga. 1999), the Georgia Supreme Court held that federal law governs this issue. The Georgia Supreme Court was presented with a motion for a new trial heard by successive trial judges in a FELA case. *Id*. at 217. The trial court ultimately denied the new trial. The main issue in *Head* concerned whether the $8,000 verdict was against the weight of the evidence and inadequate. *Id*. at 217. The Georgia Supreme Court applied the standard described in *Seaboard System Railroad, Inc. v. Taylor*, 338 S.E.2d 23 (Ga. Ct. App. 1985). In *Seaboard*, the court expressly found that in a FELA case federal law governed issues of adequacy of evidence and whether the jury's award of damages was excessive. *Id*. at 25-26. The Georgia Supreme Court in *Head* also expressly recognized the applicability of federal law to these issues and that the less stringent Georgia standards were not applicable. *Head*, 524 S.E.2d at 217, n.1. and 218.[7]

2. Tennessee Supreme Court Decision On Sufficiency Of The Evidence In FELA Cases

Our research has led us to Tennessee decisions about sufficiency of the evidence determinations in FELA cases that neither party raised in their briefs. There are Tennessee Supreme Court decisions about this issue that were decided before the United States Supreme Court decisions discussed herein. These decisions involve motions for directed verdict and *denial* of a new trial as opposed to the grant of a new trial, so they present a different procedural context.

Early Tennessee decisions found that since sufficiency of the evidence is a procedural matter, then state law governs such issues in FELA cases. *See Brenizer v. Nashville, C. & St. C. R. Co.*, 8 S.W.2d 1099, 1099 (Tenn. 1928) (holding that state and not federal practice governed motions for directed verdict in FELA cases); *Luck v. Louisville & N.R. Co.*, 69 S.W.2d 899, 901 (Tenn. 1934) (noting that the *Brenizer* decisions were called into question by United States Supreme Court decisions on the issue and holding that a directed verdict was appropriate under state or federal law). In *Kurn v. Weaver*, 161 S.W.2d 1005, 1008 (Tenn. Ct. App. 1940), the Tennessee Court of Appeals noted that state law controlled matters of procedure and federal law controlled matters of substance in FELA cases tried in state courts. The issue in *Kurn* was not the standard used to grant a new trial, but involved the standard to review *denial* of a motion for new trial. In *Kurn*, the court noted that neither the federal court nor the state courts recognized the standard urged by the appellant. *Id*. Consequently, the court in *Kurn* was not presented squarely with the issue whether to apply the federal or state law standard.

[7] CSX also cites the Tennessee case of *Pomeroy v. Illinois Cent. R.R. Co.*, W2004-01238-COA-R3-CV, 2005 WL 1217590 (Tenn. Ct. App. April 19, 2005), for the proposition that Tennessee courts have applied state law to this issue. However, *Pomeroy* does not expressly so hold and, in fact, discusses whether the evidence meets the federal "clear weight" standard.

It should be noted that all three of these cases were decided by the Tennessee Supreme Court before the United States Supreme Court decided *Brady*, *Lavender*, *Rogers* and *Brown*. At least one commentator on the subject noted that "it seems hardly likely, in the light of overwhelming contrary authority, that this view [by the Tennessee Supreme Court] would continue to be taken upon a clear-cut presentation of the issue in a case of new impression." 79 A.L.R.2d 553.

Since the decisions do not deal with the specific issue presented herein, and since the United States Supreme Court has addressed the area as a matter of federal supremacy, we are not obligated to follow the older opinions.

3. Authority Cited By CSX That State Law Applies

CSX argues that since a motion for a new trial is a procedural matter, then Tennessee law governs its consideration in FELA cases tried in state court. In support of this position CSX offers a number of decisions from state courts, including Tennessee. We do not find these cases persuasive, primarily because we believe the United States Supreme Court's decision in *Brady* is determinative. The cases cited by CSX fall into two categories. The first category is comprised of decisions by courts applying state law without a recognition or discussion of *Brady* and whether federal law may apply. The Tennessee cases fall into this category.[8] The second category of cases relied upon by CSX uses the substantive/procedural distinction to support the conclusion that state law governs whether to grant a new trial in a FELA case.

Cases cited by CSX that reached the conclusion that state law is applicable without reference to federal law are from West Virginia, Minnesota and Illinois. In *Lamphere v. Consolidated Rail Corporation*, 557 S.E.2d 357 (W. Va. 2001), the West Virginia Supreme Court in a *per curiam* decision reviewed the grant of a new trial based upon sufficiency of the evidence in a FELA case. *Id*. at 360. The court clearly applied the state law standard in reviewing the grant of a new trial without any discussion of the possibility that federal law might be applicable. Interestingly, in *Lamphere*, the state standard was the same as the standard under federal rules, *i.e.*, whether the verdict is against the clear weight of the evidence. *Id*.

In *Baker v. Amtrak National Railroad Passenger Corporation*, 588 N.W.2d 749 (Minn. Ct. App. 1999), the Minnesota Court of Appeals likewise applied state law to its review of a new trial decision in a FELA case without analysis of United States Supreme Court decisions. In *Baker*, the plaintiff appealed the trial court's refusal to grant his motion for JNOV, or alternatively, for a new trial. *Id*. at 751. Apparently, there was no issue raised or discussion of whether federal law might govern.

[8] *Ridings v. Norfolk S. R. R. Co.*, 894 S.W.2d 281, 288-90 (Tenn. Ct. App. 1994); *Jordan v. CSX Transp. Inc.*, M1999-01415-COA-R3-CV, 2001 WL 378555, (Tenn. Ct. App. April 17, 2001). *See Ballard v. Serodino*, E2004-02656-COA-R3-CV, 2005 WL 2860279 (Tenn. Ct. App. Sept. 15, 2005) (involving Jones Act). *See contra Pomeroy v. Illinois Cent. R.R. Co.*, W2004-01238-COA-R3-CV, 2005 WL 1217590 (Tenn. Ct. App. May 19, 2005).

The same result was reached in *Taluzek v. Illinois Central Gulf Railroad Company*, 626 N.E.2d 1367 (Ill. Ct. App. 1993). The plaintiff argued on appeal that the trial court erroneously failed to grant his request for a JNOV or a new trial. *Id*. at 1373. Plaintiff's claims against the railroad were brought under the Federal Safety Appliance Act and the Boiler Inspection Act. *Id*. at 1372. The court held that an action for violation of those two acts is prosecuted as an action under FELA. *Id*. The court applied state law standards to the JNOV and new trial issue without discussion of whether federal law may apply. *Id*. at 13.

It should be noted that the courts in *Baker* and *Taluzek* applied state law standards to a motion for a directed verdict, while the United States Supreme Court in *Lavender* had required state courts to apply the federal "no probative evidence" standard when reviewing a directed verdict motion under FELA. Consequently, their persuasiveness is further reduced.

Several state courts have discussed the issue whether state or federal law provides the applicable standard and concluded that state law governs because a motion for a new trial is procedural. In *Zibung v. Union Pacific Railroad Company*, 776 S.W.2d 4 (Mo. 1989), the Missouri Supreme Court decided that while federal law governed substantive issues in a FELA case, when tried in state court, state law governed a request for new trial since such requests are procedural. *Accord Braddy v. Union Pacific Railroad Company*, 116 S.W.3d 645 (Mo. Ct. App. 2003). This same conclusion was reached in cases construing the Jones Act, 46 U.S.C. § 688, by the Oregon Supreme Court in *Hust v. Moore-McCormack Lines*, 177 P.2d 429 (Ore. 1947), and the Washington Supreme Court in *Smith v. American Mail Line, Ltd.*, 363 P.2d 133 (Wash. 1961). In an unpublished opinion, the Michigan Court of Appeals reached this conclusion based upon the substantive/procedural analysis in a FELA case in *Haney v. Grand Trunk Western Railway Company*, No. 181278, 1997 WL 33347943 (Mich. Ct. App. May 16, 1997).

Based upon the decisions by the United States Supreme Court discussed earlier, we do not believe that one can comfortably rely on the substantive/procedural distinction to make this determination. First, the court in *Brady* expressly ruled in FELA cases that issues surrounding sufficiency of the evidence were federal issues. Second, the Court in *Brady* and *Brown* has likewise not relied on this procedural/substantive distinction when the issue involved jury determinations in FELA cases, because the federal right granted in FELA cannot be defeated by local procedural rules.[9]

[9] CSX cites two other cases for the proposition that state law governs new trial determinations in FELA cases. Upon closer examination, however, it is clear that in one decision the court applied federal law to the new trial issue and, in the other, it is not entirely clear that the court held state law to be applicable. *See Head v. CSX Transportation*, 524 S.E.2d 215 (Ga. 1999) (Georgia Supreme Court applied federal law) and *Smith v. Union Oil Company*, 241 Cal. App. 2d 338 (Cal. Ct. App. 1966), *cert. den*., 385 U.S. 931 (1966) (unclear whether state or federal standard was applied and favorably cited cases using the federal "clear weight of the evidence" standard).

B. Which Federal Standard

Having decided that the trial court must apply the federal standard to new trial considerations, the question then becomes what is the applicable federal standard? Mr. Blackburn appears to pose the applicability of two possible federal standards: (a) the "complete absence of probative fact" standard of *Lavender* or (b) "clear weight" standard of federal Rule 59.

1. "Complete Absence of Probative Facts" Standard

First, Mr. Blackburn argues on appeal that the federal standard to weigh the sufficiency of the evidence for the purpose of a new trial in a FELA case is the standard discussed previously from the *Lavender* decision, *i.e.*, "complete absence of probative facts."[10] According to Mr. Blackburn, this standard is applicable *whenever* the judge weighs the sufficiency of the evidence in a FELA case regardless of whether the issue is to grant a new trial or to eliminate the jury's role altogether by a directed verdict or judgment notwithstanding the verdict. We disagree.

First, each of the Supreme Court decisions cited by Mr. Blackburn for application of this strict standard considered directed verdicts and not new trials. Consequently, Mr. Blackburn has no controlling Supreme Court authority on this issue. Second, given the difference previously discussed between the grant of a new trial and the grant of a directed verdict, we conclude that a single standard does not apply to both in the FELA context. Both state and federal courts have historically recognized that differing standards generally apply to the two types of motions. Consequently, we do not believe that a motion for a new trial under FELA should be judged by the same standard as a motion for directed verdict.

Mr. Blackburn, however, cites several cases where state courts applied the "complete absence of probative facts" to a new trial request in a FELA case.

In *Meyer v. Penn. Cent. Transp. Co.*, 397 N.E.2d 60, 63-64 (Ill. App. 1979), the court found that review of jury verdicts in state FELA cases is governed by federal law and, citing cases dealing with directed verdicts and JNOV, found that under federal law a jury verdict can be "set aside" only if there is a "complete absence of probative facts" to support the verdict. The court then applied this standard to a new trial request without any further discussion. The court in *West v. Nat'l R.R. Passenger Corp.*, 879 So.2d 327, 333 (La. App. 2004), made the identical holdings. Both courts then applied the standard to new trial requests without discussion of whether the same standard that applied to directed verdicts/JNOV would also apply to motions for new trial. The third state case cited by Mr. Blackburn in support of his position that the "complete absence of probative facts" standard governs is *Weber v. Chicago & Northwestern Transp. Co.*, 530 N.W.2d 25, 27-28. In *Weber*, the court discussed that the parties had at one time argued over the standard the trial court

[10] It is unclear whether Mr. Blackburn ever argued the applicability of this standard to the trial court. Since we are remanding the matter for further consideration on whether the verdict is against the clear weight of the evidence, we will address this issue whether or not raised below.

was to use in entertaining a new trial request in a FELA case but there was apparent agreement on the "no probative facts" standard. *Id*. at 27.[11]

In all of these cases the courts were willing to take the unexamined leap from the established Supreme Court precedent that applies this strict standard in FELA cases involving a directed verdict and apply it to new trial determinations. We think this leap is both unwarranted by the case law and unwise. The consequence of a directed verdict is that the jury is taken out of the equation, while granting a new trial does not have that effect. As a consequence, the standards should differ.

Other state and federal courts have drawn this distinction between directed verdicts and new trials and have, on that basis, declined to apply the *Lavender* "no probative evidence" to requests for new trial in FELA cases. *See Braddy*, 116 S.W.3d at 651-52. Furthermore, federal courts have likewise not applied the "no probative evidence standard" to new trial requests in FELA cases, but instead have applied the Rule 59 standard, *i.e.*, whether the verdict is against the "clear weight" of the evidence. *Id*. (citing *Robinson v. Burlington Northern Railroad Company*, 131 F.3d 648 (7th Cir. 1997); *Bissett v. Burlington Northern Railroad Company*, 969 F.2d 727 (8th Cir. 1992); *Narcisse v. Illinois Central Gulf Railroad Company*, 620 F.2d 544 (5th Cir. 1980); *Cities Service Oil Company v. Launey*, 403 F.2d 537 (5th Cir. 1968) (Jones Act case); *Hampton v. Magnolia Towing Company*, 338 F.2d 303 (5th Cir. 1964) (Jones Act case); *McCracken v. Richmond, Fredericksburg and Potomac Railroad Company*, 240 F.2d 484 (4th Cir. 1957)).[12]

2. Rule 59 Standard

Alternatively, Mr. Blackburn argues that the standard used in federal courts under Federal Rule of Civil Procedure 59 governs. As discussed previously, the federal standard to determine whether to grant a new trial is whether the verdict is against the "clear weight" of the evidence. Based on the finding that the federal standard is applicable and that Rule 59 governs federal new trial determinations, we conclude that in order to grant a new trial in a FELA case tried in state court, the trial court must find that the verdict is against the clear weight of the evidence.

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[11] Mr. Blackburn cites other cases for this proposition that we find inapplicable since they either do not involve new trials or fail to articulate the standard they are applying. *See Atchison, Topeka & Santa Fe Ry. Co. v. Marzuola*, 418 P.2d 625, 628-29 (Okla. 1966) (in considering a new trial request in a FELA case, the trial court failed to articulate a standard)); *Norton v. Norfolk S. Ry. Co.*, 567 S.E.2d 851, 856-57 (S.C. 2002) (new trial governed by more restrictive "clear weight of the evidence" federal standard); *Thompson v. Barnes*, 236 S.W.2d 656, 660 (Tex. App. 1950) (issue before court was not a new trial); *Adair v. Northern Pacific Ty. Co.*, 392 P.2d 830, 831-32 (Wash. 1964) (issue before the court was not a new trial); *Sehlin v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 686 P.2d 492, 499 (Wash. Ct. App. 1984) (trial court failed to enunciate standard it applied to JNOV/new trial request in FELA case).

[12] *Contra*, *see Wilson v. Burlington Northern Railroad Company*, 804 F.2d 607, 610 (10th Cir. 1986).

IV. STANDARD OF REVIEW ON APPEAL

In federal court, orders on new trial motions based on sufficiency of the evidence are reviewed on an abuse of discretion standard. 11 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2819 (1995). *United States v. Blackwell*, 459 F.3d 739, 768 (6th Cir. 2006); *Tisdale v. Federal Express Corp.*, 415 F.3d at 528; *Barnes*, 201 F.3d at 820. A trial court abuses its discretion in its decision on a new trial if the court (a) relies on clearly erroneous findings of facts, (b) improperly applies the law, (c) uses an incorrect legal standard or (d) is otherwise "clearly erroneous." *United States v. Blackwell*, 459 F.3d at 768 (quoting *In re Brown*, 342 F.3d 620, 633 (6th Cir. 2003)). In determining whether a trial court has abused its discretion, it is appropriate to look not only to the written opinion but also any oral ruling in the matter. *Fortenberry v. New York Life Insurance Company*, 459 F.2d 114, 115-16 (6th Cir. 1972). If the trial court applied the incorrect legal standard, *i.e.*, Tennessee law, then the trial court abused its discretion when it granted the new trial.

V. REVIEW OF TRIAL COURT DECISION

The trial court's order is silent as to the standard it employed. In its oral ruling, the trial court referred to its role as the "thirteenth juror." Looking at the totality of the circumstances, we conclude that the record reflects that the trial court was applying Tennessee law, the incorrect legal standard.

First, the trial court used the term "thirteenth juror." Under Tennessee law, the trial court, in effect, is a thirteenth juror when considering whether to grant a new trial and Tennessee caselaw routinely uses this expression. Federal decisions, on the other hand, expressly disclaim the "thirteenth juror" description. In *Arms v. State Farm Fire & Casualty Company*, 731 F.2d 1245, 1248, n1 (6th Cir. 1984), the Sixth Circuit stated:

> It is worth noting that this circuit follows federal, not Tennessee, law on the standard for granting a new trial in a diversity case. Tennessee courts allow the trial judge to sit as a "thirteenth juror" when passing upon a motion for a new trial. Federal diversity courts sitting in Tennessee do not apply this standard, but instead apply the federal standard. *See, e.g., Werthan Bag Corp. v. Agnew*, 202 F.2d 119, 122 (6th Cir. 1953); *Sandlin v. Pearsall*, 427 F.Supp. 494, 495 (E.D.Tenn.1976).

The record also reflects the trial court's understanding about the differences between the state and federal standards. In response to the argument by the CSX attorney that since a motion for a new trial was procedural and consequently governed by state and not federal law, the trial court stated:

> I don't think there's really much difference, but I understand my obligation of procedural versus substantive law.

Counsel for CSX points out that after the hearing on the motion for a new trial, the trial court declined to enter an order submitted by Mr. Blackburn that indicated the ruling was based on

Tennessee law and, instead, entered an order that was silent on the issue. CSX argues that this indicates that the trial court applied the correct federal standard. We do not find this persuasive since the trial court thought there was little difference between the two standards and we do not know whether the trial court thought the state standard was similar to the federal standard or vice versa. Even if the record is ambiguous about the standard applied by the trial court, a remand is nevertheless necessary since the federal and state standards are different enough to determine the proper outcome in a case like the one before us.

We are not tempted to determine whether a new trial was appropriate by applying the stricter federal standard ourselves to determine whether the verdict was against the clear weight of the evidence.[13] Whether to grant a new trial is discretionary with the trial court even under the federal standard. Under that federal standard, the trial court is free to weigh the evidence and take into account witness credibility. An appellate court cannot fulfill this role, but is limited to reviewing whether the trial court's discretion was abused. It is not our discretion to utilize, but that of the trial court. This is why application of the wrong standard constitutes one of the few grounds for setting aside this type of discretionary decision.

Since it appears that the trial court applied the incorrect standard to the motion for a new trial, the judgment awarding a new trial is vacated, and the case is remanded to the trial court for consideration of the motion for a new trial consistent with this opinion.

VI.

The order granting CSX a new trial is vacated. The matter is remanded for consideration in accordance with this opinion. Costs of this appeal are taxed to CSX Transportation, Inc., for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE

[13] *If* we had found the more lax standard applicable *and if* the trial court had erroneously applied the harsher federal standard, then remand would not be necessary on the basis that the incorrect standard had been used. This is true because if the verdict was against the clear weight of the evidence then by necessity the verdict was likewise against the preponderance of the evidence.